Supreme Court, U.S.
FILED
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No.

IN THE

Supreme Court of the United States

MARC SEIBEL AND JEANETTE SEIBEL,
PETITIONERS

v.

JLG INDUSTRIES, INC., A PENNSYLVANIA CORPORATION AND BUILDERS SALES & SERVICE CO., AN ILLINOIS CORPORATION LICENSED TO DO BUSINESS IN THE STATE OF IOWA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. The standard for admissibility for expert testimony in Federal cases is confusing and ambiguous. The difference in application of the *Daubert* standard and the Federal Rule of Evidence 702 was violative of due process and equal protection rights under the Fourteenth Amendment because it unlawfully denies equal access to the courts.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Marc Seibel and Jeanette Seibel respectfully pray for a Writ of Certiorari to the Eighth Circuit Court of Appeals to review the judgment entered in the case on April 1, 2004.

OPINIONS BELOW

The Order in the United States Court of Appeals for the Eighth Circuit Court rendered on April 1, 2004, is attached hereto at Appendix (App.) p. 1a. The unpublished Order of the United States District Court Southern District of Iowa, Davenport Division, denying a new trial rendered on February 11, 2003 is attached hereto at App. p. 11a. The unpublished Order of the United States District Court, Southern District of Iowa, Davenport Division, rendered on November 15, 2002, is attached hereto as App. p. 9a

JURISDICTION

The Judgment of the United States Court of Appeals Eighth Circuit was entered on April 1, 2004. This original Petition was to be filed within 90 days, prior there to the Court granted and Extension of Time for filing to August 29, 2004. The jurisdiction of the Federal Circuit was invoked pursuant to 28 U.S.C. 1332 (a) (1), federal diversity of citizenship. The jurisdiction of this Court is invoked pursuant to U.S.C. 1254 (a) and Supreme Court Rule 10 (c). The United States Court of Appeals for the Federal Circuit decided a question of admissibility of expert witnesses which is in

conflict with other relevant decisions of this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant provisions of the *Fourteenth Amendment* states:

> [N]or shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This is an appeal by Marc Seibel and Jeanette Seibel, from the rulings of the District Court excluding certain expert testimony and granting defendants directed verdicts.

This case was filed in Federal Court by plaintiffs based upon diversity. The District Court, on defendant Builders Sales & Service Co. (hereinafter "Builders") Motion to Exclude, excluded all testimony of Plaintiffs' expert as to negligence or negligent entrustment. Further, The District Court on defendant JLG Industries, Inc. (hereinafter "JLG") Motion to Exclude, excluded the majority of Plaintiffs' expert testimony. The case proceeded to trial, and at the close of Plaintiffs' case, the Court directed verdicts for both defendants.

On May 27, 1998, Seibel was involved in an accident while working at a construction site in Clinton, Iowa. Seibel and a coworker, Willie Taylor, were employees of Russell Construction Company (hereinafter "Russell"), the general contractor at the site. Seibel had been instructed by Russell supervisor, Terry Burden, to assist Taylor in removing portions of a sign from the front of a building in which Russell and other contractors were remodeling. In order to access the sign, Seibel and Taylor used a self-propelled elevating work platform (hereinafter "scissors lift"), which was designed, manufactured, and distributed by JLG and owned by Builders, a sub-contractor at the site.

Seibel has asserted four theories of liability against JLG. First, Seibel claims that the scissors lift was not reasonably safe because it had a defective design. Next, Seibel claims the lift was not reasonably safe because it was manufactured with defective materials. Third, Seibel claims that JLG was negligent in designing the scissors lift. Finally, Seibel claims that JLG negligently manufactured the scissors lift with defective materials.

Plaintiffs retained Ronald Lobodzinski, a consulting engineer, as an expert witness. With respect to JLG, Lobodzinski has offered the following opinions:

1. The design of the JLG lift was unreasonable (sic) dangerous in that the operating controls were not protected against inadvertent operation.

2. JLG warning (sic) regarding the instability of the lift and proper setup were insufficient.

3. The design violated ANSI A92.6-1979, section 7.

4. The JLG lift was inherently unstable and violated ANSI A92.6-1974 (sic) section 4.

5. In 1991 (year of manufacture of the JLG lift) and before, both Skyjack and Snorkel Economy had lift operating controls protected against inadvertent operation.

6. In addition the an (sic) Emergency Stop switch, both Skyjack and Snorkel Economy had 3 position keyed switches LIFT, OFF, DRIVE. In the LIFT and OFF positions, the drive controls were inoperative.

7. The Snorkel Economy drive controls were rocker switches, not prone to be inadvertently operated by a welding hose.

8. The Skyjack drive control required a ring interlock first to be lifted before the drive control could be operated.

9. Had the involved lift been equipped with a similar control, the lift would not have fallen.

REASONS FOR GRANTING THE WRIT

1. Plaintiffs' safety engineering expert, Ronald Lobodzinski, should have been allowed to render all of his opinions that he had testified to via depositions or affidavits filed with the Court. Based on his engineering experience and aerial lift experience, as well as the investigation and testing of this particular piece of equipment, he should have been able to testify as to the defective design of the control box, as well as the safer control designs which were manufactured by JLG, which was manufactured at the time that this lift was sold.

2. JLG was guilty of designing an unreasonably dangerous aerial lift which could cause inadvertent movement in a single action on the control box. At that time they had two safer control boxes, which would take a two-step process in order to move the machine in any direction. These were considered safety options by Mr. Lobodzinski, rather than merely options as JLG referred to them.

3. The Eighth Circuit Court of Appeals reviews the exclusion of expert testimony for abuse of discretion. *Jaurequi v. Carter Manufacturing Co., Inc., 173 F.3d 1076, 1081, (8th Cir. 1999).* The abuse of discretion standard applies as much to the trial court's decisions about how to determine the expert testimony's reliability as to its ultimate conclusion of

admissibility. *Kumho Tire Co. Vs. Carmichael, 526 U.S. 137, 152, 119 S.Ct. 1167 (1999).*

4. The District Court did not follow the standard for admissibility set out in Rule 702 and, therefore, was unreasonable in concluding that Appellants' expert witness, Mr. Lobodzinski, was restricted in his testimony as to JLG and excluded from any testimony as to Builders.

The admissibility of expert testimony is governed by Rule 702 of the Federal Rules of Evidence, which states: If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or to determine a fact in issue, **a witness qualified as an expert by knowledge, skill, experience, training, or education** may testify thereto in the form of an opinion or otherwise....

Fed. R. Evid. 702, emphasis added. The recent amendments to Rule 702 expanded the Rule to include,

...If (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed. R. Evid. 702, December 2001.

First, District Court unreasonably ignored the qualification of Mr. Lobodzinski as an expert. He has spent approximately 200 hours working on this case. Mr. Lobodzinski has acted as a consultant since 1973, or

30 years. He has been involved in many construction site accidents, including approximately one dozen involving scissors lifts specifically. Mr. Lobodzinski qualifies as an expert in this case.

Second, the testimony in this case is, in part, technical and the expert opinion of Mr. Lobodzinski would assist the trier of fact in understanding the evidence. Under Rule 702, this is clearly the purpose for which expert testimony is intended. Therefore, the District Court did not follow the standard for admissibility set out in Rule 702 in excluding the expert testimony of Mr. Lobodzinski.

5. The District Court abused its discretion while acting in its role as "gatekeeper" in this case. Although the Court is given wide discretion in its determination of the reliability and relevance of expert testimony, the Court must still act reasonably.

The District Court applied an improper standard regarding the testing performed by Mr. Lobodzinski. The standard set out in Rule 702 is to determine whether or not the theory or technique proffered by the expert witness can be or has been tested. In this case, the District Court changed the standard. The court ruled at the close of Plaintiffs' case that Mr. Lobodzinski's theory of how the accident happened, was inconclusive. The District Court in effect changed the standard to "duplication" and the "ruling out other accident theories". Rule 702 should be the standard for all cases involving expert testimony.

CONCLUSION

For all of the reasons stated, this petition for writ of certiorari should be granted.

Respectfully submitted,

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(Any footnotes trail end of each document)

No. 03-1693

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Marc Seibel; Jeanette Seibel,
Appellants,

v.

JLG Industries, Inc., a Pennsylvania corporation;
Builders Sales & Service Co., an Illinois corporation
licensed to do business in the State of Iowa,
Appellees.

February 10, 2004, Submitted
April 1, 2004, Filed

COUNSEL: For MARC SEIBEL, JEANETTE SEIBEL, Plaintiffs - Appellants: Mark F. Cyr, CYR LAW OFFICE, Rock Island, IL.

For JLG INDUSTRIELS, INC., a Pennsylvania corporation, Defendants - Appellees: Denny Martin Dennis, Jason Thomas Madden, BRADSHAW & FOWLER, Des Moines, IA.

For BUILDERS SALES & SERVICE CO., an Illinois corporation licensed to do business in the State of Iowa, Defendants - Appellees: Michael A. Pope, Amy G. Doehring, MCDERMOTT & WILL, Chicago, IL. Eric Schwarz, Rock Island, IL.

JUDGES: Before MORRIS SHEPPARD ARNOLD, HEANEY, and FAGG, Circuit Judges.

OPINION BY: HEANEY

OPINION: HEANEY, Circuit Judge.

Marc Seibel was injured when an elevated platform he was working upon fell over at a construction site. Seibel brought suit against JLG Industries, Inc. (JLG), the designer and manufacturer of the lift, and Builders Sales & Service Co. (Builders), the owner of the lift, under theories of product liability and negligent entrustment. His wife, Jeanette Seibel, alleged loss of consortium. At the close of the plaintiffs' case, the district court n1 granted judgment as a matter of law for each of the defendants pursuant to Federal Rule of Civil Procedure 50. The plaintiffs appeal the district court's exclusion of certain expert testimony and the granting of judgment as a matter of law in favor of the defendants. We now affirm.

I.

On May 27, 1998, Seibel suffered severe and permanent injuries as a result of an accident on a construction site in Clinton, Iowa. Seibel was an employee of the general contractor at the site, Russell Construction Co. (Russell), and was instructed by his supervisor to assist a co-worker, Willie Taylor, in removing a sign from the front of a building. In order to access the sign, Seibel and Taylor used a selfpropelled elevating work platform called a scissors lift that Russell had borrowed from Builders, a sub-contractor on the site. The emergency stop button, or "kill switch," was missing

from the control box of this particular lift, and had been missing for several months. As a result of the missing kill switch, the scissors lift could not be deactivated. At the time of the accident, Seibel and Taylor were on the raised lift platform when the lift's controls were inadvertently activated and the lift fell over.

Prior to working for Russell, Seibel worked for Builders and had used the same scissors lift, with the kill switch missing, on several occasions. Seibel testified that he was aware that the kill switch had been removed from the control box, and that he was actually present when the kill switch was removed from the lift while he was an employee of Builders. Seibel also testified that the purpose of the kill switch was to prevent the lift from moving while the platform was in the air and that it would be dangerous to be on the platform without the kill switch present and engaged.

Appellants alleged that JLG negligently designed, manufactured, and assembled the lift and that the lift was unreasonably dangerous and defective. Appellants also alleged that Builders was negligent because it allowed a defective lift to be used on a job site when it knew, or had reason to believe, that Seibel would not know or appreciate the risks inherent in using the defective lift.

Appellants retained a consulting engineer as an expert witness. Prior to trial, the district court granted the appellees' motions in limine, excluding the testimony of the expert against Builders in its entirety and limiting his testimony against JLG. At trial, after the appellants rested their case, the appellees each moved for judgment as a matter of law pursuant to Federal Rule

of Civil Procedure 50. The district court granted judgment as a matter of law in favor of JLG because the appellants failed to show that the lift reached Seibel in the same or substantially the same condition as it was when it left JLG's control. The district court granted judgment as a matter of law in favor of Builders because prior to the accident Seibel was aware that the kill switch had been removed from the lift. As a result, the appellants failed to establish that Builders did not exercise reasonable care in informing Seibel of the lift's dangerous condition.

II.

The district court granted JLG's motion for judgment as a matter of law on the basis that a substantial change had occurred to the scissors lift after its manufacture and prior to the accident. The appellants' brief, however, argues only that their expert witness should have been allowed to testify and that alternative designs to the control box were available. The appellants do not address the basis for the district court's grant of judgment as a matter of law in favor of JLG, causing us concern as to whether the appellants have actually waived any challenge to the district court's holding. See Anderson Mktg. Inc. v. Design House, Inc., 70 F.3d 1018, 1020 (8th Cir. 1995) (holding that appellate courts "may only pass on a district court's ruling if a party challenges that ruling on appeal by raising the issue in its opening brief").

Assuming arguendo that the appellants have not waived any potential challenge to the district court's holding in favor of JLG, on appeal our court reviews a district court's grant of judgment as a matter of law de

novo, applying the same standard as the district court. Fought v. Hayes Wheels Int'l, Inc., 101 F.3d 1275, 1277 (8th Cir. 1996). A court may grant judgment as a matter of law when "a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." Fed. R. Civ. P. 50(a)(1).

Appellants alleged that there was a design defect in the scissors lift in that the controls can be operated in a one-step process rather than a two-step process required by other lifts manufactured around the same time. The one-step process, according to the appellants, allowed the lift to be inadvertently activated causing the accident. Appellants' claim that the lift's controls were defective, however, is but one element of the prima facie case they were required to prove. Under Iowa law, the appellants must also prove that, at the time of the accident, the lift was in substantially the same condition as when it left JLG's control. Fell v. Kewanee Farm Equip. Co., 457 N.W.2d 911, 918 (Iowa 1990) (requiring the plaintiff to show that the product reached the plaintiff "without a substantial change in condition from the time it was sold"). It is undisputed that the kill switch had been removed from the lift's control box and that the purpose of the kill switch was to deactivate the lift and prevent inadvertent operation. These facts defeat the appellants' prima facie case as the lift clearly reached Seibel on the day of the accident in a substantially changed condition from when it was manufactured. Appellants offer no arguments in their appeal to negate this finding by the district court.n2

Appellants also argue that the district court erred in limiting their expert's testimony as to JLG. This court reviews the exclusion of expert testimony for an abuse of discretion. Jaurequi v. Carter Mfg. Co., Inc., 173 F.3d 1076, 1081 (8th Cir. 1999). We need not address whether the district court properly excluded the expert testimony; even assuming the testimony was admitted, it would not have altered the district court's decision on the merits. See Kinserlow v. CMI Corp., 217 F.3d 1021, 1027 (8th Cir. 2000) (choosing not to address whether the district court abused its discretion by excluding expert testimony because "even assuming the testimony would have been admissible, its inclusion would not alter the result we reach today"). Even if the appellants' expert was able to testify in full, the appellants still would not have made out a prima facie case against JLG because it is undisputed that the lift did not reach Seibel in substantially the same condition as when it left JLG's control.

III.

Appellants next argue that the district court erred in excluding their expert's testimony as to Builders and in granting Builders judgment as a matter of law. These arguments are closely linked, as the appellants relied on their expert's testimony to establish a prima facie case that Builders violated OSHA standards by allowing Seibel to use the lift without a kill switch, a manual, and adequate training. Again, we review exclusion of expert testimony for an abuse of discretion. Jaurequi, 173 F.3d at 1081.

The district court held that the expert's testimony that Builders provided the lift without a manual and

adequate training was irrelevant because "there is insufficient evidence in the record to show that additional training or the presence of a manual would have prevented the accident." (Appellant's App. at 100.) We agree.

Appellants own evidence showed that Seibel was aware of the purpose of a kill switch, how to use a kill switch, that using the aerial platform without the kill switch would be dangerous, and that the kill switch was missing on the day of the accident. Seibel also testified that he had used the same scissors lift without the kill switch on several occasions. Based on these facts, the appellants failed to establish that Builders did not exercise reasonable care in informing Seibel of the lift's dangerous condition. Accordingly, we cannot find that the district court abused its discretion in excluding the expert testimony as to the absence of a manual and training.

The district court also excluded the expert's testimony as to OSHA standards because the expert failed to qualify as an expert on OSHA standards and the jury would be able to determine whether a violation had occurred without the assistance of an expert. The district court stated that it would take judicial notice of the OSHA standards and instruct the jury accordingly. Appellants, however, failed to present the OSHA standards or any evidence of an OSHA violation. We find that the district court did not abuse its discretion in excluding the expert testimony and hold that the appellants failed to establish a prima facie case of negligent entrustment against Builders, in part by failing to offer any evidence of an OSHA violation during the trial.

IV.

Appellants failed to make out a prima facie case against either JLG or Builders and we find no reversible error in the district court's evidentiary rulings or decision on the merits. Accordingly, we affirm the district court.

Footnotes

n1 The Honorable Thomas J. Shields, United States District Court for the Southern District of Iowa.

n2 We note that an argument that the scissors lift manufactured and designed by JLG was defective because the lift could still be operated even after the kill switch had been removed from the control box, may have been a stronger argument for the appellants. No such argument, however, was presented in this case.

CASE NO.: 3:989-cv-60138

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

MARC SEIBEL and JEANETTE SEIBEL,
Plaintiffs,

v.

JLG INDUSTRIES, INC., a Pennsylvania corporation, and BUILDERS SALES & SERVICE CO., an Illinois corporation licensed to do business in the State of Iowa,
Defendants.

Filed November 15, 2002

JUDGMENT IN A CIVIL CASE

XXX DECISION BY COURT. This action came to consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED: Defendants JLG Industries, Inc.'s Rule 30 Motion for Judgment as a Matter of Law offered after Plaintiffs rested their case is chief is granted.

IT IS ORDERED AND ADJUDGED: Defendant Builders Sales & Service Company's Rule 50 Motion for Judgment as a Matter of Law offered after Plaintiffs rested their case is chief is granted.

IT IS FURTHER ORDERED AND ADJUDGED: Judgment is entered for Defendants and against Plaintiff. Plaintiffs' Complaint and Amended Complaint are dismissed.

November 15, 2002
Date

/s/
Clerk

/s/
(By) Deputy Clerk

CASE NO.: 3:989-cv-60138

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

MARC SEIBEL and JEANETTE SEIBEL,
Plaintiffs,

v.

JLG INDUSTRIES, INC., a Pennsylvania corporation, and BUILDERS SALES & SERVICE CO., an Illinois corporation licensed to do business in the State of Iowa,
Defendants.

Filed February 11, 2003

ORDER ON PLAINTIFFS' MOTION FOR NEW TRIAL

Plaintiffs have alleged that the Court erred in granting defendants JLG Industries, Inc. and Builders Sales & Service Co.'s Separate Motions for Judgment as a Matter of Law pursuant to Fed. R. Civ. P. 50 at the close of plaintiffs' evidence at trial, which commenced on November 12, 2002.

Plaintiffs have filed, timely, their Motion for New trial (Clerk's No. 230), and defendant Builders Sales & Service, herinafter Builders, filed its opposition to that motion on December 6, 2002 (Clerk's No. 236). Defendant JLG Industries, hereinafter JLG, filed is resistance to plaintiffs' motion on December 12, 2002 (Clerk's No. 238). Oral arguments on plaintiffs' motion

and defendants' resistances were heard on December 27, 2002. The issues are now ripe for adjudication.

BACKGROUND OF THE CASE

Some discussion of the background of this case is appropriate at this juncture. Plaintiffs filed their Complaint on November 17, 1998, and filed a First Amended Complaint on December 9, 1998 (Clerk's No. 4).

On July 17, 2000 (Clerk's No. 38), an Order of Reference was filed, consenting to trial to the United States Magistrate Judge. Thereafter, on October 5, 2000 (Clerk's No. 52), plaintiffs filed their' Second Amended Complaint. Because of realignment of various defendants as a result of plaintiffs filing their Amended Complaints, and the filing of dispositive motions, as well as completion of discovery, trial was delayed.

Even after this case was referred to the undersigned, further dispositive motions were filed by the parties, and motions to strike plaintiffs' expert, including Daubert issues, were also filed.

This case arises out of an accident on May 27, 1998, which occurred while plaintiff Marc Seibel was using a scissors lift that was designed and manufactured by JLG. It had been bought by Builders, and was in use on the job site in Clinton, Iowa. Coincidentally, plaintiff had worked for Builders until about one month before his accident, and during his employment for Builders had used the lift a number of times. On the date of the accident, his then employer, Russell Construction Company, had borrowed the lift from Builders.

Plaintiffs alleged that JLG had negligently designed, manufactured and assembled the lift in question, and also alleged that the scissors lift, as manufactured, designed and assembled was unreasonably dangerous and defective. Plaintiffs alleged that Builders was negligent because it allowed a defective lift to be used on the job site when it knew or had reason to believe that plaintiff would not know or appreciate the risks inherent in using the defective lift.

Plaintiff Marc Seibel suffered substantial and permanent injuries as a result of this accident. His wife alleged loss of consortium.

At trial plaintiffs called as witnesses on the issues of liability, Marc Seibel, Willie Taylor, plaintiffs co-worker who was injured in the same accident as plaintiff, and Ronald Lobodzinski, plaintiffs' expert witness. Both plaintiff and Taylor described in detail what happened on the morning of the accident, although the two of them were not in complete agreement on their respective positions on the scissors lift, and exactly what jobs they were performing at the time the scissors lift tipped and fell to the ground. Taylor believed that the scissors lift was supported on one side by a wooden board, which had been put in place the day before the accident, while plaintiff believed that the lift was supported under all four wheels by two different boards. He also believed that the scissors lift had been put in place the day before the accident; Taylor testified that he moved the lift into position on the day of the accident, and raised it so that he and plaintiff would work on removing a sign from the existing building.

Lobodzinski testified regarding his opinions that the scissors lift was defective in its design, and that JLG was negligent in designing, manufacturing and assembling this particular lift because the controls operating the lift could be, in Lobodzinski's opinion, inadvertently activated without the operator's knowledge. Seibel had operated this particular lift a number of times prior to the accident, and he was fully familiar with its operation and how its controls functioned. Both Seibel and Taylor testified that they were aware that the emergency stop button was not in place the day of the accident. Plaintiffs' co-employee, Willie Taylor, had used the scissors lift in question for approximately two and a half weeks before this accident occurred.

THE ISSUES

At the close of plaintiffs' case on November 15, 2002, both Builders and JLG presented their separate motions pursuant to Fed. R. Civ. P. 50 seeking judgment as a matter of law on plaintiffs' claims. After hearing arguments presented by counsel for defendants, as well as plaintiffs' arguments and resistances to those motions, the Court granted the two motions filed by defendants. See, Partial Transcript of Proceedings filed November 19, 2002 (Clerk's No. 227).

Rule 50 provides in pertinent that:

Rule 50. Judgment as a Matter of Law in Jury Trials; Alternative Motion for New Trial; Conditional Rulings
(a) Judgment as a Matter of Law.

(1) during a trial by jury a party has been fully heard on a issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law ... with respect to a claim ... that cannot under the controlling law be maintained ... without a favorable finding on that issue.

(2) Motion for judgment as a matter of law may be made at any time before submission of the case to the jury....

Plaintiffs seek a new trial pursuant to Fed. R. Civ. P. 59, which provides in pertinent part that

Rule 59. New Trials; Amendment of Judgments

(a) Grounds. A new trial may be granted to ... any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States ...

(b) Time for Motion. Any motion for a new trial shall be filed no later than 10 days after entry of the judgment.

* * *
* * *
* * *

Are the grounds upon which plaintiffs rely in seeking a new trial sufficient to allow the Court to grant the relief they seek?

Because the issues are different as to defendants JLG and Builders, the Court will consider plaintiffs' Motion for New Trial separately as to each defendant.

DEFENDANT JLG

The Court granted defendant JLG's Motion for Judgment as a Matter of Law because it found in considering the evidence in the light most favorable to plaintiffs, the scissors lift manufactured, designed, assembled and distributed by JLG did not reach the plaintiff in the same or the substantially same condition as it was when it left JLG's control, and because of that change in condition, plaintiffs had not established that any act or omission on the part of JLG was a proximate cause of the accident in question.

The Court believes, and continues to believe, that that ruling was mandated by the very evidence that plaintiffs themselves presented at trial. There was absolutely no controversy or contradiction at trial among plaintiffs' witnesses, and in particular Seibel and his co-employee, Taylor, that an emergency stop button, often referred to as a "red button" was missing from the control panel of the lift on the date of the accident. See, Taylor testimony (Partial Transcript pp. 39, 70) (Clerk's No. 228); Seibel testimony (Partial Transcript pp. 162-163) (Clerk's No. 228). In fact, Seibel was present at the time the red button was pulled out of the control box approximately one month prior to the accident. (Partial Transcript, p. 163)

Plaintiffs' expert, Lobodzinski, upon his first examination of the scissors lift in question also found that the red emergency stop button was missing from the control box. (Partial Transcript p. 83) (Clerk's No. 228) Taylor testified (Partial Transcript p. 6) (Clerk's No. 228) that the red emergency stop button had been missing all the time he used the scissors lift, approximately two and a half weeks prior to the accident.

The JLG Operation and Safety Handbook admitted into evidence as part of the Final Pretrial Conference Order as Exhibit 103, and Exhibit 213, at p. 13 describes the purpose of the emergency strip switch, variously identified by Seibel and Taylor, as well as Lobodzinski, as the red button, as follows:

An EMERGENCY STOP switch is located at the Platform and Ground Controls. When depressed, the electrical system is deactivated. Before normal machine operation can be resumed, the switch must be returned to the normal UP position.

Wright v. Brooke Group, Ltd., 652 N.W.2d 159 (Iowa 2002), is instructive in this case. While that decision turned on a certified question of law from the United States District Court for the Northern District of Iowa, and involved a suit for personal injuries brought by a smoker against a cigarette manufacturer, the Court's decision touches on several of the issues present in this case: design defect and products that reach the ultimate user in the condition intended by the manufacturer.

The Court in Wright, 652 N.W.2d at 167, discarded the distinction between strict liability and negligence

theories when applied to a design defect case, noting "we are convinced such a distinction is illusory, just as we found no real difference between strict liability and negligence principles in failure-to-warn cases."

The fact that there is no distinction between strict liability and negligence principles in a design case such as this, does not obliterate the other elements that a plaintiff must prove in order to establish that the alleged defective design rendered the product unreasonably dangerous and defective. One of the very crucial elements that a plaintiff must prove is that the scissors lift here was expected to, and it did reach the plaintiff without substantial change in its condition. Fell v. Kewanee Farm Equipment Company, 457 N.W.2d 911, 918 (Iowa 1990). See also, Mercer v. Pittway Corp., 616 N.W.2d 602, 620 (Iowa 2000).

This Court is also mindful that strict liability claims generally involved factual issues to be resolved by a jury or other trier of fact. Mercer v. Pittway Corp., 616 N.W.2d at 620; Bredberg v. Pepsico, Inc., 551 N.W.2d 321, 326 (Iowa 1996); Fell v. Kewanee Farm Equipment Company, 457 N.W.2d at 918.

This Court does not find, based upon the evidence that plaintiffs themselves presented, that there was any basis upon which a reasonable jury could have reached a different conclusion. The missing red emergency stop button, which the admitted trial exhibits establish, can shut down the entire unit. That button was an integral part of the electrical system of the scissors lift. The absence of that button prevented both Seibel and Taylor from disabling the entire electrical system of the scissors lift, and which would have prevented any

inadvertent actuation of the lift's controls, if that is exactly what occurred at the time of this accident. The removal of the button was not due to some unexplained phenomenon. Seibel saw a co-employee pull it out.

This Court is, pursuant to Erie R. Co. v. Tompkins , 304 U.S. 64, 58 S.Ct. 817, 822, 82 L.Ed. 1188 (1938), applying Iowa state substantive law to this case, but federal procedural law. Gasperini v. Center for Humanities, 518 U.S. 425, 426-27, 116 S.Ct. 2211, 2219, 135 L.Ed.2d 659 (1996).

In ruling on a motion pursuant to Rule 50, for judgment as a matter of law, the court is to inquire whether there is any "legally sufficient evidentiary basis for a reasonable jury to find for [the opponent of the motion]." Inadmissible evidence contributes nothing to a "legally sufficient evidentiary basis." Weisgram v. Marley Co., 528 U.S. 440, 441, 120 S.Ct. 1011, 145 L.Ed.2d 958 (2000); Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 242, 113 S.Ct. 2578, 125 L.Ed.2d 168 (1993). See also, Fed. R. Civ. P. 50(a)(1). Under Rule 50, a court should render judgment as a matter of law when a party has been fully heard on an issue, and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue. Reaves v. Sanderson Plumbing Products Inc., 530 U.S. 133, 120 S.Ct. 2097, 2109, 147 L.Ed.2d 105 (2000).

In light of these dictates from the Supreme Court, this Court has no doubt that its decision to grant judgment as a matter of law in favor of JLG at the close of plaintiffs' evidence was abundantly supported by plaintiffs' own evidence, and not contrary to law. The

jury could neither have found that the red emergency stop button was in place on the lift at the time of the accident, or that it fell out for some unexplained reason, nor could it have. found that the JLG lift reached plaintiff Marc Seibel in a condition intended by defendant.

In this context, the Court considers plaintiffs' allegations that the Court erred as a matter of law in granting the Rule 50 motion made by defendant JLG. The Court rejects that premise. As has been pointed out above, plaintiffs themselves presented the evidence that defeated their own claim: the JLG lift did not reach plaintiff Marc Seibel in the condition intended by JLG. Design defect aside, the Court need not consider whether plaintiffs had made a prima facie case that the lift could be inadvertently actuated in some unknown manner.

Upon appeal, a grant of the judgment as a matter of law is reviewed de nova, applying the same standards used by the district court. Gagnon v. Sprint Corp., 284 F.3d 839, 847 (8th Cir. 2002); Fogelbach v. Wal-Mart Stores, Inc., 270 F.3d 696,700 (8th Cir. 2001), (a motion pursuant to Rule 50, judgment as a matter of law, should only be granted when a party has been fully heard on an issue, and there is no legally sufficient evidentiary basis for a jury to find for that party on that issue). See also, Phillips v. Collings, 246 F.3d 843, 847 (8th Cir. 2001) (in determining a Rule 50 motion, the court must draw all reasonable inferences in favor of the nonmoving party without making credibility assessments or weighing the evidence).

The facts, as noted above, simply do not support plaintiffs' claims as a matter of law.

Considering plaintiffs' motion for a new trial, when taking into account the very reasons why the Court granted defendant's motion for judgment as a matter of law, the Court likewise finds no grounds upon which to grant a new trial. The decision of whether to grant a new trial requires a weighing and balancing of the facts, and the careful consideration and articulation of reasons by the district court. White v. Pence, 961 F.2d 776, 782 (8th Cir. 1992). Those reasons are set forth at length above.

The authority to grant a new trial is confided almost entirely to the exercise and discretion on the part of the trial court, White v. Pence, 961 F.2d at 781; Brown v. Synthex Lab., Inc., 755 F.2d 668, 673 (8th Cir. 1985), quoting Allied Chemical Corp. v. Daiflon, Inc., , 449 U.S. 33, 36, 101 S.Ct. 188, 191, 66 L.Ed.2d 193 (1980). Great deference is to be accorded the trial judge's decision in ruling on motions for a new trial. Brown, 755 F.2d at 673. This Court has plainly articulated its reasons for not only granting defendant JLG's Rule 50 motion, but also why it has denied plaintiffs' motion for a new trial.

DEFENDANT BUILDERS

For most of the same reasons that the Court has granted judgment as a matter of law to defendant JLG, and denied plaintiffs' motion for a new trial, it denies plaintiffs' motion for a new trial as to defendant Builders.

The reasons are straightforward and simple: plaintiffs' alleged negligent entrustment in their suit against Builders; they did not prove that allegation, and a reasonable jury could not have found in their favor on that issue. Fed. R. Civ. P. 50(a)(1).

The factual elements necessary for plaintiffs to establish the negligent entrustment were belied by their own case. Seibel had worked for Builders for several months prior to being laid off because of lack of work. During his tenure with Builders, he operated the lift in question on numerous occasions, and in fact claims to have been present when one of his co-workers pulled the emergency stop button out of its receptacle on the control panel of the lift. Seibel knew what the stop button did, and why it was there.

Very shortly after has layoff from Builders, plaintiff was hired by Russell Construction Company on the same job site. Builders and Russell had, at least informally, an equipment sharing arrangement, which permitted Russell employees to utilize Builders' lift, the very one that plaintiff had operated numerous times. He knew how it operated; he knew its characteristics; and he knew the emergency stop button was missing. At the time of its ruling, in which it granted Builders' Rule 50 motion, the Court relied upon Restatement of Law (Second) Torts § 388, which provides in pertinent part

One who supplies directly or through a third person a chattel for another to use the subject of liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use for physical harm

caused by the use of the chattel in the manner for which and by a person for whose use it is supplied if the supplier, (A) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied; and (B) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition; and (C) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.

It must be remembered, and based upon the evidence before this Court, that at the time of this accident plaintiffs' employer Russell Construction was the general contractor, and had control of the work site; defendant Builders was a subcontractor which gratuitously allowed employees of Russell to use the lift in question.

At the time the Court granted Builders' Rule 50 motion, it also relied on Kennedy v. U.S. Const. Co., 545 F.2d 81, 84 (8th Cir. 1976). That case is also instructive as to the issues before this Court now. The Court, id., stated

Although a general contractor may be liable to an employee of a subcontractor on account of the unsafe conditions of tools and appliances which the general contractor was required to furnish, ordinarily it is the obligation of a subcontractor to supply his own employees with tools and appliances, and the general contractor is not liable for the negligence of the subcontractor in furnishing unsafe tools or appliances. (citation omitted)

It sometimes happens that one subcontractor on a job will lend tools or equipment to another subcontractor with knowledge that the tools or equipment will be used by employees of the latter. In such a situation, the lending party may be held liable to an employee of the borrowing party arising from a patent defect in the tools or equipment lent if the lender was compensated for the bailment, or if the bailment was mutually advantageous to the lender and borrower. But if the lender received no compensation from the borrower, and derived no advantage or benefit from the arrangement, then he is not liable for injury to any employee of the borrower. (citations omitted)

There is no evidence here that Builders received any compensation from Russell for the use of this lift. In fact, according to Seibel and Taylor, the two of them were performing Russell Construction work in removing an old sign from the front of the building, which was being remodeled pursuant to the contract with Russell Construction. Nothing before the Court suggest or establishes that Builders was in any way receiving even a benefit by permitting Russell employees to use the Builders lift.

Therefore, the Court concluded, and persists in that conclusion, that Builders was under no duty to warn plaintiff Marc Seibel of any potential dangers, especially because he already knew that the emergency button was missing, and he knew that if it was able to be activated it could shut down the operation of the lift.

Plaintiff's evidence, however, was even more deficient. Seeking to impose liability upon Builders for negligent entrustment, plaintiff only presented evidence that

established that plaintiff Marc Seibel had more information about the condition of the lift than did Builders. While Seibel testified that he was present when the emergency button was removed by a co-employee, both of whom were working for Builders, there was no evidence whatsoever that Builders itself was aware that that had occurred, and that it failed to do anything about it. Even assuming that Builders did know of this damage to its lift, and took no precautions, the fact remains that plaintiff had equal knowledge about the condition of the lift, and in fact plaintiff knew exactly what the consequences were if the emergency button was missing while the lift was being operated. Plaintiffs failed to establish that Builders did not exercise reasonable care to inform Seibel of the dangerous condition, or of facts which would likely make the lift dangerous.

This Court concluded that Rule 50 relief was appropriate for Builders because of the fact that no reasonable jury could reach a different conclusion. This Court would not permit plaintiffs to attempt to capitalize upon Marc Seibel's own prior knowledge regarding the condition of this lift.

In granting the motion in favor of Builders, this Court viewed the evidence presented by plaintiffs during their case in a light most favorable to them. Kennedy, 545 F.2d at 82.

Plaintiffs presented absolutely no evidence that Builders breached any duty that was owed to them by virtue of loaning the lift it owned to Russell for the benefit of Russell employees.

The analysis performed above regarding the denial of plaintiffs' motion for a new trial against JLG, applies equally to plaintiffs' motion as to Builders. White v. Pence, 961 F.2d 776, 780-782 (8th Cir. 1992).

For these reasons, plaintiffs' motion for a new trial is denied as to Builders.

CONCLUSION

Plaintiffs Marc Seibel and Jeanette Seibel's Motion for New Trial as to both defendants JLG Industries, Inc. and Builders Sales and Service Co. is denied. Plaintiffs have not established that the Court's granting of the motions for judgment as a matter of law filed pursuant to Fed. R. Civ. P. 50(a)(1) was erroneous as a matter of law.

IT IS SO ORDERED.

Dated this 11th day of February, 2003.

THOMAS J. SHIELDS
UNITED STATES MAGISTRATE JUDGE

(2)

Supreme Court, U.S.
FILED
NOV 2 3 2004
OFFICE OF THE CLERK

No. 04-285

IN THE

Supreme Court of the United States

MARC SEIBEL AND JEANETTE SEIBEL,
PETITIONERS

v.

JLG INDUSTRIES, INC., A PENNSYLVANIA CORPORATION AND BUILDERS SALES & SERVICE CO., AN ILLINOIS CORPORATION LICENSED TO DO BUSINESS IN THE STATE OF IOWA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR REHEARING

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GROUNDS FOR PETITION FOR REHEARING

The standard for admissibility for expert testimony in Federal cases is confusing and ambiguous. The difference in application of the *Daubert* standard and the Federal Rule of Evidence 702 was violative of due process and equal protection rights under the Fourteenth Amendment because it unlawfully denies equal access to the courts.

ARGUMENT

The Eighth Circuit Court of Appeals reviews the exclusion of expert testimony for abuse of discretion. *Jaurequi v. Carter Manufacturing Co., Inc., 173 F.3d 1076, 1081, (8th Cir. 1999).* The abuse of discretion standard applies as much to the trail court's decisions about how to determine the expert testimony's reliability as to its ultimate conclusion of admissibility. *Kumho Tire Co. Vs. Carmichael, 526 U.S. 137, 152, 119 S. Ct. 1167 (1999).*

The District Court did not follow the standard for admissibility set out in Rule 702 and, therefore, was unreasonable in concluding that Appellants' expert witness, Mr. Lobodzinski, was restricted in his testimony as to JLG and excluded from any testimony as to Builders.

The admissibility of expert testimony is governed by Rule 702 of the Federal Rules of Evidence, which states, If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or to determine a fact in

issue, **a witness qualified as an expert by knowledge, skill, experience, training or education** may testify thereto in the form of an opinion or otherwise....

Fed. R. Evid. 702 emphasis added. The recent amendments to Rule 702 expanded the Rule to include,

...If (1) the testimony is based upon sufficient fact or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed. R. Evid. 702, December 2001.

First, District Court unreasonably ignored the qualification of Mr. Lobodzinski as an expert. He has spent approximately 200 hours working on this case. Mr. Lobodzinski has acted as a consultant since 1973 or 30 years. He has been involved in many construction site accidents including approximately one dozen involving scissors lifts especially. Mr. Lobodzinski qualifies as an expert in this case.

Second, the testimony in this case is, in part, technical and the expert opinion of Mr. Lobodzinski would assist the trier of fact in understanding the evidence. Under Rule 702, this is clearly the purpose for which expert testimony is intended. Therefore, the District Court did not follow the standard for admissibility set out in Rule 702 in excluding the expert testimony of Mr. Lobodzinski.

The District Court abused its discretion while acting in its role as "gatekeeper" in this case. Although the Court is given wide discretion in its determination of the reliability and relevance of expert testimony, the Court must still act reasonably.

The District Court applied an improper standard regarding the testing performed by Mr. Lobodzinski. The standard set out in Rule 702 is to determine whether or not the theory or technique proffered by the expert witness can be or has been tested. In this case, the District Court changed the standard. The court ruled at the close of Plaintiffs' case that Mr. Lobodzinski theory of how the accident happened, was inconclusive. The District Court in effect changed the standard to "duplication" and the "ruling out other accident theories". Rule 702 should be the standard for all cases involving expert testimony.

Respectfully submitted,

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November , 2004

CERTIFICATION OF COUNSEL

Comes now, attorney Mark F. Cyr, counsel for Petitioners herein, and certifies that the foregoing Petition for Rehearing of the Order denying Petitioners' Petition for Writ of Certiorari complies with Rule 44 of this Honorable Court, and that same is limited to the requirements thereof. Counsel herein further certifies that this Petition is presented in good faith and not an attempt at delay.

MARK F. CYR
Attorney for Petitioners